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IN THE

Supreme Court of the United States

October Term, 1957.

No. 915

MICHELE DESSI,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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No.

MICHELE DESSI,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To The Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

MICHELE DESSI, by his attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 13, 1958.

OPINIONS BELOW.

The opinion of the Court of Appeals is to be found in 251 F. 2d 149 (C. A. 3, 1958). This is the final judgment of the United States Court of Appeals for the Third Circuit where judgment was entered for Respondent affirming the judgment of the United States District Court for the Eastern District of Pennsylvania.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 13, 1958 (24). The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Are conflicts between circumstantial evidence and affirmative evidence to be resolved by the jury in cases under the Federal Employers' Liability Act?

2. Was not the action of the court below in setting aside the jury's verdict, which was based upon petitioner's circumstantial evidence, a denial of petitioner's rights under the Seventh Amendment of the Constitution of the United States?

CONSTITUTIONAL PROVISION AND THE STATUTE INVOLVED.

1. Constitution of the United States, Amendment VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The Federal Employers' Liability Act, 45 U. S. C., § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404], the pertinent portion of which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Terri-

tories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT OF THE CASE.

This is an action under the Federal Employers' Liability Act, 45 U. S. C. § 61 et seq. The jury, after ample instructions by the trial judge, rendered a verdict for petitioner. Respondent's motions for judgment and a new trial were filed and the trial judge granted the motion for judgment. The Court of Appeals for the Third Circuit affirmed the judgment for Respondent.

Petitioner, who was sixty-three years old at the time of trial and had been employed by respondent since 1925 (4a), was injured on November 25, 1953, when he was struck in the head by a jack handle and knocked unconscious (10a). The accident occurred when a gondola car was being jacked in order to put wedges in the journal box (35a). In that situation the entire weight of the car is on the jack (35a).

On the day of the accident respondent was working as a mechanic in the car shops in Altoona (4a). In the car

shops there were five numbered tracks in the open and in addition there were the storehouse track and the paint track (4a). The paint track was nothing but soft, smouldering ground filled in with paper, cinders, old ties, dirt, rubbish, ashes and sand (7a, 19a, 22a, 49a). The sand came from the cars which had been sandblasted (7a, 49a). Respondent's witnesses admitted that this was the composition of the ground (117a).

Petitioner testified that this was the first time he had jacked a car on the paint track (11a). In this he was corroborated by two witnesses for the respondent who said they had never jacked a car on the paint track before. These two witnesses were Mr. Holes, a gang foreman since 1948, and Hoffman, petitioner's helper (98a, 108a). Indeed, the few times that an employee had been sent to jack a car on the paint track, the union representative had complained that the ground there was unsafe (37a). Petitioner further proved that on the very day of this accident when he was ordered to go to the paint track, he protested but was forced to yield to his foreman's orders (7a).

When petitioner went down to the paint track the car on which he was to work was coupled to other cars and it was shown that a coupled car should not be jacked (7a, 11a, 18a, 43a).

In addition to showing the unsafe character of the place where he was compelled to work and the dangerous circumstances of the coupled cars, petitioner also proved that there was a safe or safer method which should have been used. He had done this work before on four other tracks because the ground was solid and because proper and adequate equipment was available there (11a). Although the proper method was to use two twenty-ton jacks to get the weight of the car off the truck (11a, 48a), petitioner was only supplied with a single fifteen-ton jack (30a).

This accident could only have occurred because the jack was defective, the place where the jacking was done was unsafe or because the jack was improperly operated. Respondent argued the last of these possibilities. The

trial judge specifically charged that the jury could not find liability based upon a defective jack (131a). He also charged that if the jury found petitioner improperly operated the jack and that this was the sole cause of the accident, there should be a verdict for respondent (131a). The verdict was for petitioner. Therefore, the jury could only have found liability on the ground that the unsafe place where petitioner was ordered to do the jacking caused the accident. The jury could have and obviously did find that either the unsafe condition of the ground caused the jack to shake, tilt or sink, or that the failure to uncouple the cars plus the insufficiency of the jacking equipment, or a combination of these caused the jack handle to fly out (39a, 40a, 43a).

Following its application of a rule of law which forms the core of a question presented here for review, the court below found that although there was negligence, such negligence of respondent did not contribute to the accident, in whole or in part, and affirmed the entry for respondent.

REASONS FOR GRANTING THE WRIT.

1. The decision below is erroneously based upon a rule of law promulgated in *Pennsylvania Railroad Company v. Chamberlain*, 288 U. S. 333, 53 S. Ct. 391 (1933) which is ripe for re-examination and overruling [Cf. *Girouard v. United States*, 328 U. S. 61, 66 S. Ct. 826 (1946)]:

(a) The court below erroneously construed respondent's oral evidence as "uncontradicted affirmative evidence to the contrary";

(b) The court below then erroneously held that a jury may not draw inferences from circumstantial evidence when there is contrary "affirmative evidence" on the other side. This application is in conflict with the decisions of this Court in *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946); *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957); *McBride v. Toledo Terminal Railroad Company*, 354 U. S.

517, 77 S. Ct. 1398 (1957); *Schulz v. Pennsylvania Railroad Company,* 350 U. S. 523, 76 S. Ct. 608 (1956). It is also in conflict with the decision of the Third Circuit in *Lukon v. Pennsylvania Railroad Co.,* 131 F. 2d 327 (C. A. 3, 1942).

2. The question of the continued authority of the rule of law in the *Chamberlain* case, *supra,* is of dominating public importance because that rule pulverizes every claim for relief under the Federal Employers' Liability Act, 45 U. S. C. § 51 et seq. in which a beneficiary under the Act must prove his case circumstantially against a defendant's case proven "affirmatively". Untold numbers of such cases of necessity arise from railroad accidents which leave beneficiaries of the Act widowed, amnesic or unconscious. Thus where railroads can produce any witness who testifies "affirmatively" against the inference plaintiff produces from his necessarily circumstantial evidence, no matter how incredible, hostile or biased the witness may be, the rule in *Chamberlain* will force results directly in conflict with the decisions of this Court in *Schulz v. Pennsylvania Railroad Company,* 350 U. S. 523, 76 S. Ct. 608 (1956) and *Stinson v. Atlantic Coast Line R. Co.,* U. S. 78 S. Ct. 136 (1957).

3. The decision below takes from the jury the right to pass upon credibility, draw inferences and discard or disbelieve that which is inconsistent with its conclusion. This is in direct conflict with the decision of this Court in *Lavender v. Kurn,* 327 U. S. 645, 66 S. Ct. 740 (1946).

4. The decision below deprives petitioner of his rights to trial by jury under the Seventh Amendment to the Constitution of the United States and in conflict with *Lavender v. Kurn,* 327 U. S. 645, 66 S. Ct. 740 (1946).

5. In denying petitioner his right to a jury trial, the decision conflicts with the command of this Court in *Tennant v. Peoria & P. U. Ry. Co.,* 321 U. S. 29, 64 S. Ct. 409

(1944), and *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946), and therefore, "special and important reasons for the grant of certiorari" exist: *Rogers v. Missouri Pacific Railroad Company, supra,* at 352 U. S. 510, 77 S. Ct. 451; and See *Wilkerson v. McCarthy,* 336 U. S. 53, 69 S. Ct. 413 (1949) and *Ellis v. Union Pac. R. Co.,* 329 U. S. 649, 67 S. Ct. 598 (1947).

> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears the litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction . . ." *Rogers v. Missouri Pacific Railroad Co., supra,* 352 U. S. 509, 77 S. Ct. 450.

ARGUMENT.

One of the bases of causal negligence relied upon below by petitioner was the fact that he was ordered to work, over his protest, on soft, rubbishy, sandy, smouldering, loose fill (7a, 19a, 22a, 49a). From this evidence the jury could reasonably have inferred that the jack sank or tilted, releasing the offending handle. As to this, the court below said: (20).[1]

> "* * * And there was no such showing concerning the consistency of the ground that a sinking could properly be inferred in the teeth of the uncontradicted affirmative evidence to the contrary. *Cf. Pennsylvania R. R. Co. v. Chamberlain,* 1932, 288 U. S. 333 . . ."

The *Chamberlain* case relied upon below held two things: (1) that where the evidence gives support to each of two inconsistent inferences, the party having the burden of sustaining one as against the other can not prevail; (2) that where recovery depends upon inference from proven facts, the inference can not be drawn in the face of the opponent's affirmative evidence that the fact did not exist. It was the second phase of the *Chamberlain* holding that the lower court mistakenly thought applied here.

Respondent's evidence was not "uncontradicted affirmative evidence to the contrary." The lower court itself says: "Neither he nor his helper, whose back was turned, nor anyone else, saw or knows just what happened" (20). There was no eyewitness testimony as to what happened *at the time* of the accident. And the best that can be said for the testimony as to the position of the jack after the accident was that it was still bearing the weight of the car.[2] There was no testimony that it had not

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1. All subsequent references to the opinion below are to that opinion as paginated in the Appendix to this Petition.

2. Although petitioner, on cross-examination, referring to a time before the accident, said the ground did not "cave in", he also said that after the accident, he did not look to see if it had sunk or the jack was still bearing the weight of the car (23a, 24a), so that "At best,

sunk and there was absolutely nothing to exclude the reasonable inference of a momentary tilting because of the condition of the ground. There were, therefore, only conflicting inferences to be drawn from the evidence, and the case is therefore governed by *Lavender v. Kurn,* 327 U. S. 645, 66 S. Ct. 740 (1946) and the host of cases that followed.

The reliance upon *Chamberlain* was therefore the application of a wrong rule of law and demands reversal: *Cf. Rogers v. Missouri Pacific Railroad Co.,* 352 U. S. 500, 562, 77 S. Ct. 443, 480 (1957); *McBride v. Toledo Terminal Railroad Company,* 354 U. S. 517, 77 S. Ct. 1398 (1957).

However, for aught that appears in the opinion, there *was* affirmative evidence to the contrary. With this apparent justification, the lower court relied upon *Chamberlain.* That is the real vice of the opinion below. The inescapable result is a precedent which applies and perpetuates a principle that has no logical or legal validity in view of the decisions of this Court. The holding below that the jury is not free to draw a circumstantially supported inference and discard or disbelieve affirmative oral evidence inconsistent with its conclusion is a radical revision of the jury-power rule of *Lavender v. Kurn*[3] that:

> ". . . the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion."

Lavender v. Kurn, supra, was decided in 1946. This Court has never since followed either phase of the *Chamberlain* holding in a Federal Employers' Liability Act case. Indeed, in 1943, three Justices of the Court characterized its first phase as among "New and totally unwarranted formulas, which should surely be eradicated at the first opportunity . . .": Dissent of Justices Black, Douglas and

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uncertainty as to the fact arises from the petitioner's testimony, and in that circumstance not the court, but the jury, was the tribunal to determine the fact." *Rogers v. Missouri Pacific Railroad Co., supra* at 325 U. S. 504, 77 S. Ct. 447.

3. 327 U. S. 645, 653, 66 S. Ct. 740, 744 (1946).

Murphy in *Galloway v. United States,* 319 U. S. 372, 404, 405, 63 S. Ct. 1077, 1094 (1943).

Since the criticism in *Galloway* and the holding in *Lavender,* at least one court, after reviewing *Tiller v. Atlantic Coast Line R. Co.,*[4] and *Tennant v. Peoria & P. U. R. Co.,*[5] convincingly decided with direct reference to *Chamberlain,* that the first phase of its holding does not ". . . represent the accepted view of the law". *Baltimore & O. R. Co., v. Postum,* 177 F. 2d 53, 55 (C. A. D. C., 1949).

The first phase of the *Chamberlain* holding has thus been cast in a most dubious light and can fairly be said to be a discredited rule. Its companion ruling—the second phase of the *Chamberlain* holding—is now here because the court below anomalously saw fit to quicken it when the history of Chamberlain's treatment by the courts, the great unbroken stream of jury-power cases flowing from the *Lavender v. Kurn* holding and the root constitutional considerations of the Seventh Amendment should have compelled a conclusion that this rule in *Chamberlain* should not be and is no longer the law.

It was in the light of these same considerations—the clear tenor of this Court's opinions and the Seventh Amendment thrust—that Judge Holtzoff's conclusion in *Postum* as to the first phase of *Chamberlain* was inevitable. It was inevitable even in the absence of an explicit assertion by this Court overruling *Chamberlain,* for the set of the current was apparent from the bank. The second phase of *Chamberlain* must be swept in the same direction.

In *Atlantic Coast Line v. Anderson,* 221 F. 2d 548, (C. A. 5, 1955), the court relied upon the *Chamberlain* case to reverse a verdict for the plaintiff in a suit under the F. E. L. A. In that case the Fifth Circuit said (p. 551):

> "The undisputed and unimpeached evidence of the engineer, the only eyewitness, establishes that this could not have been done, and it is settled law that,

4. 318 U. S. 54, 63 S. Ct. 444 (1943).
5. 321 U. S. 29, 64 S. Ct. 409 (1944).

with the record standing thus, the jury may not disregard his testimony to turn to speculation. Pennsylvania Ry. Co. v. Chamberlain, 288 U. S. 333, at page 341, 53 S. Ct. 391, 77 L. Ed. 819".

This Court, in a per Curiam order, granted certiorari and reversed. Justices Reed, Frankfurter, Burton and Harlan were of the opinion that certiorari should not have been granted: *Anderson v. Atlantic Coast Line,* 350 U. S. 807, 76 S. Ct. 60 (1955).

This Court's per Curiam reversal of *Anderson* might be fairly susceptible of two readings:

(1) Since the Court of Appeals in *Anderson* squarely relied upon the second phase of the *Chamberlain* rule, this Court's reversal of that holding may mean that *Chamberlain* is no longer law. If this be so, then the decision below is the application of a wrong rule of law and the grant of the petition and a reversal of the judgment below are manifestly indicated.

(2) In reality, however, the *Anderson* case did not properly present for decision the validity of the *Chamberlain* rule. Proof-wise, it was not a case of circumstantially proven inferences against contrary affirmative evidence. It was, therefore, the invocation of a rule which actually had no place in the decision. The petition for the writ in *Anderson* expressly demonstrates that the sole question presented for review by this Court was the sufficiency of the evidence under the F. E. L. A. and the Seventh Amendment.

We humbly suggest that had *Anderson* presented the important and novel legal issue of the applicability of *Chamberlain* to F. E. L. A. cases, the whole Court would have considered the merits of this question of nationwide importance: *Cf. Minneapolis & St. Louis Railroad Company v. Bombolis,* 241 U. S. 211, 36 S. Ct. 595 (1916); *Reed v. Pennsylvania Railroad Company,* 351 U. S. 502, 76 S. Ct. 958 (1956); *Norwood et al v. Kirkpatrick, etc.,* 349 U. S. 29, 75 S. Ct. 544 (1955); *The Baltimore and Ohio Railway Com-*

pany v. Jackson, 353 U. S. 325, 77 S. Ct. 842 (1957); *Shields v. Atlantic Coast Line Railroad Company,* 350 U. S. 318, 76 S. Ct. 386 (1956); *Southern Pacific Company v. Gileo et al.,* 351 U. S. 493, 76 S. Ct. 952 (1956); *Kernan v. American Dredging Company,* U. S. , 78 S. Ct. 394 (1958).

This case then presents a truly novel, important and eminently reviewable question for decision by this Court. We respectfully submit that where there is a conflict between circumstantial and oral affirmative testimony, the conflict must be resolved by the jury under the Seventh Amendment and the Federal Employers' Liability Act. The contrary dictate of the *Chamberlain* rule is therefore wrong. It should now be overruled by name.

The decision in *Chamberlain,* and hence the decision below bottomed upon it, are in direct conflict with decisions of this Court under the Federal Employers' Liability Act beginning with *Lavender v. Kurn,* 327 U. S. 645, 66 S. Ct. 740 (1946).

First: Lavender lays down the rule (327 U. S. pp. 652-653, 66 S. Ct. p. 744) that:

> "Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."

Under the *Chamberlain* rule, adopted by the lower court, the jury's function of judging the credibility of witnesses disintegrates. It becomes of no moment that the jury may have regarded the "affirmative" witnesses as unbelievable, for the jury never had the chance to pass on the question. In fine, under *Lavender* the jury judges credibility. Under *Chamberlain,* it does not.

Second: Lavender holds (327 U. S. p. 653, 66 S. Ct. p. 744) that:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts

are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those *whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.*" (Emphasis supplied.)

Chamberlain says that although facts are in dispute and the evidence is such that fair-minded men may differ, the fact-finders may not choose what seems to them the most reasonable inference for the sole reason that one side is circumstantial and the other "affirmative". Under the *Lavender* rule, the jury's finding here must stand. Under the *Chamberlain* rule, it must not.

Third: Lavender tells us (327 U. S. p. 653, 66 S. Ct. p. 744) that:

> ". . . the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion."

Chamberlain tells us the direct opposite. Under *Lavender,* the jury could have disregarded and disbelieved the "affirmative" oral evidence of defendant's witnesses. Under *Chamberlain,* the court had to accept that evidence.

Fourth: Chamberlain (and the court below) announce that we can not accept circumstantial evidence in the face of direct testimony.

The court below had previously said in *Lukon v. Pennsylvania Railroad Company,* 131 F. 2d 327, 329 (C. A. 3, 1942):

> ". . . Although there was no witness who actually saw Lukon struck, there was ample circumstantial evidence to indicate how he was injured. Such evidence has probative value equal to that of testimonial evidence."

This Court, in *Rogers v. Missouri Pacific Railroad Co.,* 352 U. S. 500, 508, 77 S. Ct. 443, 449 (1957) states that:

> "The burden of the employee is met, and the obligation of the employer to pay damages, arises,

where there is proof, even though entirely circumstantial, from which the jury may with reason make that inference [of causal negligence]."

And in the footnote to that statement (footnote seventeen):

"Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. The Robert Edwards, 6 Wheat. 187, 190, 5 L. Ed. 238."

Thus the Third Circuit is at war with itself and with this Court. *Chamberlain* is equally at war with the later holdings of this Court and with its expressed philosophy.

In order to understand the overwhelming consequences of the *Chamberlain* rule we need merely turn to this case. The lower court said (20):

"And there was no such showing concerning the consistency of the ground that a sinking could properly be inferred in *the teeth of the uncontradicted affirmative testimony to the contrary. Cf. Pennsylvania R. R. v. Chamberlain,* 1932, 288 U. S. 333." (Emphasis supplied.)

Using this statement as a basis, the court below concluded in the very next sentence (20):

"We conclude, *therefore,* that there is no evidentiary basis for a rational inference that the alleged behavior of the jack handle was to any extent caused by the condition of the ground upon which it was being used." (Emphasis supplied.)

Thus, the lower court ruled, not that petitioner's circumstantial evidence was intrinsically insufficient, but that it was extrinsically insufficient under *Chamberlain* because of the countervailing direct testimony. Once that conclusion of extrinsic insufficiency had been reached, the conclusion that there was no evidentiary basis for a "rational

inference'' was inescapable. This must be so, for once the affirmative evidence appeared, the lower court regarded petitioner's circumstantial evidence as utterly without significance.

To say this is to reveal at once the appallingly mechanical operation of the *Chamberlain* rule. Under it, the issue is determined without any evaluation of the proof, save the extrinsic inquiry of whether it is circumstantial on the one hand and direct on the other. Thus, it compels an *a priori* determination of an issue which by all teachings of human experience can only be determined rightly by the use of man's reason with all that implies: evaluating behavior, testing credibility, interest, bias and observation,—in short, the composite thought-processes of a jury.

The *Chamberlain* rule works a double havoc: it evicts the jury from its constitutional role as the judge of credibility and of ultimate truth, and then leaves the court with little, if anything, to do in evaluating the detailed facts of the record independently. The lower court's treatment of the record here is vivid proof that this is indeed the impact of *Chamberlain* upon the courts.

Petitioner's affirmative testimony showed the precise nature of the ground where he was ordered to do his job. It was soft, rubbishy, sandy, smouldering, loose fill (7a, 19a, 22a, 49a). Clearly, absent the rule of disappearing proof adopted by the court below, the decisional law which developed between *Lavender v. Kurn, supra,* and *Rogers and McBride, supra,* would overwhelmingly command the conclusion that this affirmative evidence was unquestionably sufficient to support an inference that the jack sank or tilted with the consequent accident and injury.

In characterizing the record, the court below said merely that the ground at the site was ''less firm'' (20) sandy, smouldering, loose fill. Obviously, the ground could be ''less firm'' than other ground and still support the jack, and to weigh the circumstantial value of petitioner's

testimony, it was critical to treat it with precision and not by the diluted characterization of "less firm". But the court below did not do this, not because of a desire to distort, but merely because petitioner's evidence had become unimportant to the court. The petitioner's evidence could only have become unimportant because the court felt impelled to accept affirmative evidence and to reject countervailing circumstantial evidence. Indeed, once it accepted the rule of disappearing proof it had no other choice but to reject that circumstantial evidence.

The same rule of disappearing proof explains the lower court's failure to find in the record, probative facts which, "with reason", supported inferences of negligence and causation. Certainly, no one reading the facts in *McBride v. Toledo Terminal Railroad Company,* 345 U. S. 517, 77 S. Ct. 1398 (1957) and *Stinson v. Atlantic Coast Line Railroad Company,* U. S. , 78 S. Ct. 136 (1957) could doubt for an instant that petitioner's proof here, given its full strength, created a jury issue. But the lower court appears not to have read the facts in those cases, again not because of indifference, but because it deemed them unimportant. So far as the lower court was concerned, petitioner's proof here had simply been obliterated by respondent's affirmative evidence. Petitioner's record just no longer existed. And from a record where petitioner's evidence was, in effect, non-existent, of course neither negligence nor causation could be inferred, "with reason." Any other result would have been unreasonable.

The obvious and completely devastating effect of the decision below is to rob F. E. L. A. employees of an important aspect of Seventh Amendment rights—the right to prove a case by inference. It says very bluntly that where inferentially proven facts are contradicted by affirmative evidence, even though oral, that oral evidence *must* be believed.

The application of such a rule to Federal Employers' Liability Act cases is ruinous. Countless actions are

brought under this Act by widows or by those rendered amnesic or unconscious by their accidents. They must often rely on circumstantial evidence alone. Under the rule applied below, just claims would be defeated by the production of even a single live witness who may be hostile, biased, mistaken or incredible. Inevitably, witnesses for Federal Employers' Liability Act defendants are the defendants' own employees. The interests of these witnesses are often allied with those of the defendant; but, says the court below, such witnesses must be believed.

The lower court's summary abolition of the right to prove a case by inference is a massive invasion of the classic jury province. From time immemorial jurors, enlightened by experience, observing attitude, demeanor and appearance, testing probabilities and witnesses' opportunity for accurate observation, probing bias, and finally reaching a composite view, have passed upon the credibility of other human beings who came before them as witnesses.

The court below destroyed all of that. It said in effect: the jury may have been favorably impressed by the demeanor and attitude of petitioner's witnesses. It may have been skeptical of respondent's witnesses. Based upon its impressions, formed by observation, it may have concluded to believe petitioner's evidence and draw the inferences sought and to disbelieve the respondent's contradictory witnesses and reject their "affirmative" evidence. The lower court now says the jury can not do this, but must accept at face value the testimony which the twelve rejected.

CONCLUSION.

Petitioner in this case is an illiterate (126a, 127a) laborer. His accident rendered him unconscious (10a). He had not a single friendly eyewitness. And the type of witnesses who opposed him is perhaps best exemplified by the man (Harnden) who was willing to have this totally

illiterate petitioner's "X" on a statement which said "I have read the above statement in its entirety and it is true and correct to the best of my knowledge" (123a). Or perhaps by the man (Hertig) who averred that a freight car could be jacked effectively upon a sandy beach (114a).

It is hardly surprising that the jury disbelieved respondent's witnesses and accepted petitioner's proof, which had to be circumstantial because of his unconsciousness. The monstrous result of the decision below is to vitiate that acceptance and to breathe the fragrance of verity into otherwise dank testimony.

This is no isolated situation. Michele Dessi is a prototype. There are literally thousands of Dessis throughout this country who are now faced with this intolerable and indeed, insurmountable rule of proof. This case is important, of course, to petitioner. But its wide-flung implications will inevitably be felt by many men or their widows in many courts of many states and circuits. This is the inescapable impact of the *Chamberlain* rule, perpetuated by the holding below.

We submit that the *Chamberlain* rule subverts the command of the Congress and authority of this Court's recent law. The writ should issue; *Chamberlain* should be overruled by name and the decision below should be reversed.

Respectfully submitted,

JOSEPH S. LORD, III,
CHARLES A. LORD,
SEYMOUR I. TOLL,
Counsel for Petitioner.

RICHTER, LORD & LEVY,
Of Counsel.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,261

MICHELE DESSI,
Appellant

v.

PENNSYLVANIA RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued Nov. 19, 1957

Before BIGGS, *Chief Judge;* GOODRICH and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 13, 1958)

HASTIE, *Circuit Judge.*

In this Federal Employers' Liability Act case the appellant Dessi, plaintiff below, asks us to reverse a judgment entered for the defendant, notwithstanding a jury verdict for the plaintiff on his personal injury claim. The dis-

trict court reasoned that the evidence offered no rational basis for a conclusion that the plaintiff's injury, in the language of the statute, "result[ed] in whole or in part" from the railroad's negligence. We must now decide whether there was a jury question on the issue of causation.

Plaintiff, a sixty-three year old mechanic, was rendered unconscious just after he had jacked up one corner of a railroad car. Neither he nor his helper, whose back was turned, nor anyone else, saw or knows just what happened. It was plaintiff's theory, and one of the possibilities under the evidence, that the handle of the jack suddenly moved in such a way as to strike plaintiff on the back of his head and to knock him unconscious. But beyond this the plaintiff had to provide the jury with some rational basis for concluding that some negligence of the railroad helped cause the jack handle to behave in this way. *Gill v. Pennsylvania R.R.*, 3d Cir. 1953, 201 F.2d 718.

There was evidence that for the operation in question the defendant had imprudently placed the car on a track where the ground was less firm than it was alongside nearby tracks customarily used for such work. But such lack of care in selecting a place for this work could be causally connected with the accident only if the jack sank into the ground or tilted somewhat, thus becoming "offsprung" and causing the handle to fly up. All of the affirmative evidence on this point—and there was a substantial amount—indicated that this jack, which was mounted on a block, did not tilt or sink into the ground at all, but remained upright in proper position after the accident. And there was no such showing concerning the consistency of the ground that a sinking could properly be inferred in the teeth of the uncontradicted affirmative evidence to the contrary. *Cf. Pennsylvania R.R. v. Chamberlain,* 1932, 288 U.S. 333. We conclude, therefore, that there is no evidentiary basis for a rational inference that the alleged behavior of the jack handle was to any extent caused by the condition of the ground upon which it was being used.

Next, it is suggested that some imperfection or defective condition of the jack, which reasonable inspection would have disclosed, caused an abnormal movement of the handle. But neither at trial nor on this appeal has any supposed defect even been identified, much less characterized as one which reasonable inspection might have disclosed. To the contrary, there was affirmative evidence that the jack was in good condition and working properly.

Again, there is some suggestion that prudence would have indicated the use of a heavier jack for this job. But it is agreed that the jack actually used was of fifteen ton capacity, and there is nothing from which one could rationally conclude that lifting one corner of a car a few inches, as was done here, was likely to or did in fact overburden the jack. There is no evidence whatever that the jack moved or shifted in any way or failed properly to sustain the weight it was supporting. It appears merely that after the plaintiff fell to the ground, the handle of the jack was also lying on the ground.

In these circumstances it has become necessary for the plaintiff to argue, as he does in his brief, "that if the plaintiff merely proved that there was a safer method of doing the job and he was then knocked unconscious and then saw the jack handle on the ground he would be entitled to have the jury pass upon the issue of whether the failure to adopt the safer method caused the accident *in part*." For this position plaintiff finds support in the view, recently expressed by the Court of Appeals for the Seventh Circuit, that "it will be seen from . . . three cases decided in 1957 [*Rogers v. Missouri Pac. R.R.*, 352 U.S. 500; *Webb v. Illinois Central R.R.*, 352 U.S. 512; and *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521] that the majority of the United States Supreme Court now take the position that jury verdicts under the F.E.L.A. can be permitted to stand even though based solely on speculation." See *Gibson v. Elgin, J. & E. Ry.*, 7th Cir. 1957, 246 F.2d 834, 837. Moreover, Mr. Justice Harlan, dissenting in the three cited

cases, which were decided at the same time, said that their "implication seems to be that the question, at least as to element of causation, is not whether the evidence is sufficient to convince a reasoning man, but whether there is any scintilla of evidence at all to justify the jury verdicts." 352 U.S. 559, 564. But, as we read Mr. Justice Brennan's majority opinions the Court did not purport to do, or view its decisions as doing, what the dissenting Justice thought was being done.

In the first of the group of three decisions, *Rogers v. Missouri Pac. R.R.*, 1957, 352 U.S. 500, the Court had this to say about proof of causation under the Federal Employers' Liability Act:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506.

This language indicates that the role of a defendant's negligence in helping bring about the injury may be small. It does not suggest that an F.E.L.A. plaintiff can carry his burden of proof without evidence that the role was real. Indeed, the paragraph containing the quoted sentence continues with this observation:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." 352 U.S. at pages 506-7, 77 S. Ct. at page 448.

The repeated use of the phrase "with reason"—it appears three times in this short paragraph—is a persuasive indication that the court intended no departure from the familiar and normal requirement of our jurisprudence, as repeatedly

stated in its own rather recent decisions, that the party with the burden of proof must "present probative facts from which the negligence and the causal relation could reasonably be inferred." See *Tennant v. Peoria & P.U. Ry.*, 1944, 321 U.S. 29, 32; *Myers v. Reading Co.*, 1947, 331 U.S. 477, 485; and compare the rationalization in *Lavender v. Kurn*, 1946, 327 U.S. 645, 653.

It is also to be considered whether the more recent *per curiam* decisions in *McBride v. Toledo Terminal Rd. Co.*, 1957, 354 U.S. 517 and *Stinson v. Atlantic Coast Line R.R.*, No. 442, CCH Supreme Court Reports at 56, November 18, 1957, lend significant support to appellant's view of the Supreme Court's present position. Both of these *per curiam* opinions cite *Rogers v. Missouri Pac. R.R., supra*, telling us no more than that, applying the *Rogers* rationale, the Court has found jury questions in these latest cases. They suggest no doctrinal departure from the *Rogers* case, upon which we already have commented.

Accordingly, we hold that the absence of evidence, either circumstantial or direct, tending to show that negligence of the defendant had any influence or effect in causing plaintiff's injury, justified the entry of judgment notwithstanding the verdict in this case. It is not necessary to consider the trial court's alternative position that even if judgment *non obstante* were legally incorrect, a new trial should be ordered.

The judgment will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,261

MICHELE DESSI,

Appellant,

v.

PENNSYLVANIA RAILROAD COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge,* and GOODRICH and HASTIE, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

January 13, 1958

RECEIVED & FILED
Jan. 13, 1958
IDA O. CRESKOFF,
Clerk